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No. 89-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.1 LIST

Johnson Controls, Inc. has no parent. It holds a controlling interest in the following companies which are not wholly-owned subsidiaries: Technotrim, Inc.; Trim Master, Inc.; Johnson Controls (NZ) Ltd.; Naue-JCA Verwaltungsgesellschaft mbH; JCI SDN BHD; Naue GmbH & Co. KG; Vintec Company; Yokogawa Johnson Controls Corp.; Johnson Yokogawa Corporation; Pannabco; Pannesma; Pan Am Information Systems; Faini F.A.I.N. SrL; Seating Systems Technology, Inc.

LIST OF PARTIES

Contrary to this Court's Rule 14.1(b), the petition does not contain a list of all parties to the proceeding in the Court of Appeals for the Seventh Circuit. In addition to the International Union listed on the petition's caption, those parties were UAW Local Unions Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516, and 1719, and Lois Sweetman, Linda Burdick, Elsie Nason, Mary Estelle Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney, and Donald Penney, all plaintiffs-appellants; Local 322, Allied Industrial Workers of America, AFL-CIO, an intervening plaintiff-appellant; and Johnson Controls, Inc., the sole defendant-appellee.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Johnson Controls, Inc., by its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of the judgment in *International Union, UAW v. Johnson Controls, Inc.,* 886 F.2d 871 (CA7 No. 88-1308, Sept. 26, 1989).

COUNTERSTATEMENT OF THE CASE

The UAW's petition repeatedly either misstates or overlooks the record evidence, how the District Court and the Court of Appeals analyzed that evidence, and the UAW's own concessions and waivers of material issues that it now belatedly seeks to raise.

A. The Substantial Risks Of Irreversible Injuries To Unborn Children Through Maternal Exposure To Lead.

The UAW conceded to the Court of Appeals that it was "clear" that the record evidence established a "substantial risk of harm to the fetus" from lead exposure. Brief of Plaintiffs-Appellants 33. *See also id.*, at 37 (substantial risk to fetus "is not one of the disputed issues"). In its petition to this Court, however, the UAW now suggests that the harms to unborn children from the "relatively low" blood lead levels involved here are in fact "very subtle" and that, for all the record discloses, "the likelihood of *any* harm to a child of an exposed women [*sic*] employee" may be no more than "one in a million." Pet. 7 n. 3, 8 (emphasis in original).

This effort to render obscure what was "clear" below is unconvincing.

1. As both the District Court and the Court of Appeals concluded after exhaustive reviews of the record,[1] there is overwhelming evidence that, at the levels involved here, lead in a pregnant woman's blood poisons the fetus's developing brain and central nervous system. Lead "transfers" from the woman's blood across the placenta to the fetal circulatory system; "[b]ecause the fetus's blood system is nourished by the mother, the unborn child possesses approximately the same blood lead level as the mother." Pet. App. 12a & n. 13 (citing evidence). Once in the fetus's blood, lead causes "substantial irreversible cellular and functional damage to the brain," Silbergeld Dep. 49-50; this is so because a fetus (like a small child but unlike an adult) has not yet developed a barrier that would prevent lead from entering its brain directly from its blood, Fishburn Dep. 14-23.[2] *See generally* evidence cited at Pet. App. 12a-17a, 104a-107a.

The results of such damage are devastating and have variously been characterized as including *irreversible* "retarded cognitive

[1]*See generally* Pet. App. 12a-20a, 32a-36a, 48a-49a, 53a, 104a-108a, 114a-115a.

[2]Dr. Charles W. Fishburn is Assistant Clinical Professor in the Department of Preventive Medicine at the University of Wisconsin-Madison.

development," Chisolm Aff. ¶ 6;[3] *permanent* "intellectual and motor retardation, behavioral abnormalities and deficiencies in learning abilities," Scialli Aff. ¶ 7;[4] "decreased neuro-behavioral development," Whorton Aff. ¶ 8;[5] and a "clear decrement in the subsequent mental development of the infant," Hammond Aff. ¶ 3.[6] Far from "one in a million," Pet. 8, the risk of such injuries from the maternal blood lead levels involved here was established below to be "large," "substantial," and "grave."[7]

The effects of such injuries are "very subtle," Pet. 7 n. 3, only in the sense that they "may not fully manifest themselves until the child is diagnosed as having learning problems in a school setting some five to six years after birth," Pet. App. 16a. At that point the child

> " 'discovers that he can't remember, that his brain cannot pay attention, what our psychologists here called deficits in auditory processing, which is a fancy way of saying they can't understand what they hear, can't process it, and use it effectively. And those things will impair a child perhaps toward the end of the first grade, particularly in the second grade.' " Pet. App. 16a, *quoting* Chisolm Dep. 27.

2. These injuries cannot be avoided by waiting to remove a female employee from exposure to the lead levels involved in this case until she decides to become pregnant. First, it would be irresponsible to ignore the fact that, in the Court of Appeals' words, frequent "unplanned or undetected pregnancies" are "one

[3]Dr. J. Julian Chisolm is Director of the Lead Program at John F. Kennedy Institute in Baltimore and Associate Professor of Pediatrics, Johns Hopkins School of Medicine.

[4]Dr. Anthony R. Scialli is Director of the Reproductive Toxicology Center in Washington, D.C.

[5]Dr. M. Donald Whorton is Senior Occupational Physician/Epidemiologist at Environmental Health Associates, Inc. in Oakland, California, and Associate Clinical Professor of Occupational Medicine at the University of California School of Public Health in Berkeley.

[6]Dr. Paul B. Hammond is Professor of Environmental Health at the University of Cincinnati.

[7]*See, e.g.*, Fishburn Dep. 61, 74; Scialli Aff. ¶ 10; Chisolm Aff. ¶ 6; Whorton Aff. Ex. C; Hammond Aff. ¶ 3. *See also* Pet. App. 12a, 20a, 32a, 114a-115a, 119a.

of the exigencies of life"; "[u]nder a policy requiring removal only on discovery of pregnancy, the unborn child would be subject to lead exposure throughout the period prior to diagnosis of pregnancy." Pet. App. 9a n. 11, 10a; *see also* Chisolm Aff. ¶ 9; Scialli Aff. ¶ 11.[8] Second, lead is an "accumulative toxicant"—because it builds up in the blood and soft tissues and is stored in the bones, blood lead levels may take two or three times as long to decrease as they do to increase. And because the bones decalcify during pregnancy to nourish the developing fetus, "stored lead" can be "transferred" to the fetal brain long after the mother's removal from lead exposure. Pet. App. 17a-19a (quoting evidence).[9]

It was precisely because of this continuing threat to "the growing brain of the fetus" that the Centers for Disease Control announced several years ago that "[t]he prevention of lead exposure to the fetus needs special emphasis. *Women of childbearing age should be excluded from working at jobs where significant lead exposure occurs.*"[10]

3. It is the fetus's *direct* exposure to the maternal blood lead levels involved here that causes the injuries described above. The UAW unsuccessfully sought below to create a genuine factual dispute as to whether equivalent fetal injuries can be *genetically* caused by malformed sperm ("teratospermia") from male workers *with blood lead levels equivalent to those at issue here*. As the Court of Appeals concluded, the evidence of such an equivalent risk "is, at best, speculative and unconvincing." Pet. App. 34a.

[8]The fetus may suffer severe harm from lead exposure during this time. Moreover, it is believed that lead is stored in the placenta " 'during the early stages of pregnancy to be released [later] when the placenta becomes functional.' " Pet. App. 19a n. 24 (citations omitted); *see also* Fishburn Dep. 22, 26-27.

[9]*See especially* Whorton Aff. Ex. C, p. 8 ("Since lead is an accumulative toxicant which is stored in the bone, with a half-life in the body of 5 to 7 years, a woman with a significant blood lead burden would pose a potential hazard to any conceptus for many years after exposures"); Chisolm Aff. ¶ 10 ("if a woman is exposed to blood lead levels in excess of 25 or 30 micrograms for any length of time, such levels will not decrease sufficiently to avoid damage to the fetus, even if she is removed when the pregnancy is discovered").

[10]Centers for Disease Control, U.S. Department of Health and Human Services, *Preventing Lead Poisoning in Young Children* 21 (1985) (emphasis added). *See* n. 16 *infra*.

The UAW's petition to this Court continues to mischaracterize what the available evidence shows. That evidence—including the 12-year-old OSHA rulemaking record relied upon so heavily throughout the petition—at most suggests that men with roughly equivalent blood lead levels may risk temporary reductions in fertility—*i.e.*, decreased number of sperm ("hypospermia") or sperm with decreased mobility ("asthenospermia")—but that risks of birth defects or other fetal injuries caused by deformed sperm occur only at much *higher* paternal blood lead levels than those involved here.[11] Those *higher* levels are avoided through compliance with OSHA's maximum lead-exposure limits applicable to all employees. *See* 29 CFR § 1910.1025 (1989). OSHA's standards, however, do *not* prevent the fetal injuries described above, which result from the fetus's dependence upon the maternal environment and are inflicted at much *lower* blood lead levels. *See generally* Pet. App. 34a-35a, 115a-116a, 119a; Chisolm Aff. ¶ 8; Scialli Aff. ¶ 10; CDC, *Preventing Lead Poisoning in Young Children*, n. 10 *supra*, pp. 7, 20-21.

The UAW also sought to rely on rodent studies in positing that male-transmitted fetal injuries might occur at lead levels comparable to those at issue here. As discussed in further detail below,

[11]OSHA, for example, has noted that while hypospermia and asthenospermia have been detected at 41 micrograms per 100 grams of whole blood—11 micrograms above Johnson Controls' maximum allowable limit for fertile women—teratospermia (malformed sperm) have been detected only at the much higher level of 53 micrograms, nearly twice the maternal blood lead levels known to pose substantial dangers of direct and irreversible harm to fetuses. *See* App. C to 29 CFR § 1910.1025, p. 185. The discussion of the OSHA rulemaking record in *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1256-1257 (CADC 1980), *cert. denied*, 453 U.S. 913 (1981), similarly fails to identify any evidence of fetal injuries caused by male blood lead levels *equivalent to those involved here*.

Using the rubric of "reproductive" risk, the UAW's petition cites only to a *fertility* study in support of the *very different* proposition that, at a male blood lead level of 30 micrograms, there is a "significant risk" to the "health of potential children." Pet. 8 & n. 5.

however, the evidence established that those studies could not be extrapolated to humans given the material differences between human and rodent reproductive systems. Even UAW experts ultimately conceded that the evidence of "male-mediated" risk at the lead levels involved in this case is, at best, speculative; "[w]e don't know" whether such risks at these levels really exist. Brix Dep. 19-20; *see also* pp. 23-24 *infra*. That is a far cry from the "overwhelming evidence" and "general consensus within the scientific community" as to the irreversible destruction caused by fetal exposure to the maternal blood levels here at issue. Pet. App. 20a.[12]

B. Johnson Controls' Responses To These Risks.

Johnson Controls, a manufacturer of automotive and specialty batteries, has long been a recognized industry leader in its comprehensive efforts to protect employees and their families from the adverse effects of lead.[13] The company's programs, which long predated OSHA regulation in this field, exceed OSHA's current requirements (*see* 29 CFR § 1910.1025 (1989)) and have significantly reduced the blood lead levels of its employees.[14] As the courts below found, however, neither Johnson Controls nor any-

[12]The UAW also cites to evidence of other potential adult health risks at the 30 microgram level, such as increased risks of high blood pressure. Pet. 9 & n. 6. This ignores the fact that adult effects can be monitored and controlled apart from measuring blood lead levels and that, when ill effects in employees are detected, corrective action, including removal if necessary, can and is taken *regardless* of blood lead levels. These monitoring and corrective measures cannot be taken with respect to fetuses. *See, e.g.*, Fishburn Dep. 11-14, 20-25, 30, 81-82; Beaudoin Aff. Ex. B, pp. 125-127, 131-132, Exs. D, F-G. Moreover, it is generally accepted that "the fetus is more vulnerable to levels of lead that would not affect adults." Pet. App. 115a; *see also* Chisolm Aff. ¶¶ 6-8; Scialli Aff. ¶¶ 5, 10; Whorton Aff. ¶ 9 and Ex. C; Fishburn Dep. 14-23; Legator Dep. 47-50; CDC, *Preventing Lead Poisoning in Young Children*, n. 10 *supra*, pp. 20-21.

[13]As summarized by the Court of Appeals, these efforts include elaborate environmental engineering controls; extensive biological monitoring, medical surveillance, and employee counseling and education programs; and programs for respirator use, employer-provided clothing and shoes, personal hygiene, improved work practices, and paid wash-up and shower time. Pet. App. 3a-4a; *see also* Beaudoin Aff. ¶ 6, Ex. B, pp. 118-133, 171-172, Exs. C-I.

[14]Beaudoin Aff. ¶¶ 18-19, Exs. B, L-M.

one else has to date been able "to utilize engineering research and technology to implement a system or procedure capable of reducing the lead exposure of its employees to acceptable levels for fertile women." Pet. App. 9a; *see also id.*, at 116a ("it is apparent that the company is doing all that it can to reduce lead exposure levels to safe levels").

From 1977 to 1982, Johnson Controls attempted a variety of fetal protection measures focusing on employee education and counseling and voluntary avoidance of high-risk positions by women planning to have children. Notwithstanding its voluntary program, fertile women continued to work in high-lead areas and at least six employees became pregnant with lead levels in excess of 30 micrograms per deciliter of whole blood; at least one infant showed early signs of fetal lead injuries. Pet. App. 6a-8a.

Based on the failure of these earlier attempts, and in light of the growing evidence of the substantial health risks involved, Johnson Controls in 1982 adopted the Fetal Protection Policy at issue in this case. As described in further detail by the Court of Appeals, the policy generally prohibited women capable of bearing children from working in jobs where there was a likelihood that their blood lead levels would rise above 30 micrograms per deciliter—the Centers for Disease Control's standard then in effect. Pet. App. 5a-6a & n.7, 54a.[15] Employees covered by the policy who already were in such high-risk positions were permitted to remain in those positions if they were able to maintain their blood lead levels below 30 micrograms; those who could not were transferred to other positions and paid medical removal protection benefits to ensure they suffered no loss in wages. Fertile women who were not presently in high-risk positions were precluded from transferring into them. Since 1982, Johnson Controls has continued to review, update, and refine its policy in light of

[15]Although the UAW now argues that Johnson Controls might have used other methods in determining likelihood of high blood lead levels in particular positions, *see* Pet. 2, 5-6 & n. 2, 12, 24 n. 16, it waived the issue of alternative approaches below, *see* pp. 9-10, 19-21, *infra*.

the best available medical evidence so as to reduce fetal health risks while minimizing the effect upon fertile women.[16]

C. The Proceedings Below.

In the District Court, the parties stipulated to the certification of the case as a class action consisting of certain past, present, and future employees affected by the Fetal Protection Policy. After the parties had been given a full opportunity for discovery, Johnson Controls moved for summary judgment. The District Court followed the lead of the Fourth and Eleventh Circuits in placing on Johnson Controls the burden of demonstrating (a) substantial risks of fetal harm at the lead levels at issue and (b) that transmission of that risk occurs through female but not male employees. Pet. App. 113a-118a. The District Court found the record evidence created no genuine dispute with respect to either issue: the risks are substantial; "retarded cognitive development" and other harms "are abnormalities too serious for this Court to find unimportant"; and at the 30 microgram level these dangers are confined to transmission through women. "Men simply cannot expose a fetus to lead in the same way women can." *Id.*, at 117a, 119a-120a.[17]

[16]In 1985, the Centers for Disease Controls lowered from 30 to 25 micrograms its recommended maximum "umbilical cord blood level[ ]" for lead. *See* n. 10 *supra.* Ironically, the UAW's petition simultaneously criticizes Johnson Controls' 30 microgram standard as being more relaxed than the CDC's recommended standard while elsewhere criticizing Johnson Controls for not following the even more relaxed OSHA standards, which only require the removal of employees with blood lead levels of 50 micrograms or more. Pet. 7 n. 3; *see also* 29 CFR § 1910.1025(c),(k) (1989). Although not reflected in the record, after this case had been submitted to the Court of Appeals Johnson Controls revised its policy and adopted the CDC's present recommended 25 microgram level.

The UAW also criticizes a provision in the *original* 1982 policy that excluded fertile women from jobs in "lines of progression" which contained high-risk positions. This argument was waived below. *See* pp. 9-10, 19-21 *infra.* Moreover, this provision applied only to *applicants* and thus did not affect the certified class (*employees*) represented by the UAW in this case. In addition, the "lines of progression" provision was *eliminated* when Johnson Controls revised its policy and thus is no longer in effect.

[17]The District Court also found that the UAW had failed to establish "an acceptable alternative that would have a lesser impact on females." Pet. App. 119a. The UAW waived this issue on appeal. *See* pp. 9-10, 19-21 *infra.*

The Court of Appeals affirmed the District Court's judgment in a 7-4 *en banc* decision.[18] The UAW's Statement of the Case seriously mischaracterizes the majority's decision in several important respects.

First. The UAW asserts "[t]he Court of Appeals expressly recognized that placing the burden of proof on the plaintiffs . . . was essential to its ultimate affirmance of summary judgment for the defendant company." Pet. 11. That is untrue. The court instead concluded that the allocation of proof burdens was *irrelevant* given the record evidence in this particular case: if a business necessity analysis was used and the burden of persuasion placed on the UAW (pursuant to *Ward's Cove Packing Co. v. Atonio,* 109 S. Ct. 2115 (1989)), Johnson Controls was entitled to summary judgment; if instead a bona fide occupational qualification (BFOQ) analysis was used and the burden of persuasion on all issues placed on Johnson Controls, Johnson Controls *still* was entitled to summary judgment. Pet. App. 42a, 48a-54a, 58a-59a. Rather than "essential," the burden-of-persuasion issue in this case was immaterial.[19]

Second. Both in its Statement of the Case and elsewhere throughout its petition, the UAW repeatedly criticizes the Court

[18]Two of the dissenting judges, while disagreeing with the majority that summary judgment had been appropriate on the specific record here, nevertheless agreed that Title VII does *not* categorically prohibit an employer from adopting fetal protection policies of the sort involved in this case. *See* Pet. App. 60a n. 1 (Cudahy, J., dissenting) (under Title VII, "[t]he employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decisionmaking"); Pet. App. 69a (Posner, J., dissenting) ("I can find nothing in the text of the statute, or in its history or purpose, to prevent an employer from defending his refusal to allow fertile women to work in jobs in which they are exposed to dangerous concentrations of airborne lead on the ground that such refusal is reasonably necessary to the normal (civilized, humane, prudent, ethical) operation of his particular business").

[19]Similarly inaccurate is the UAW's assertion that "[t]he majority opinion does not mention the PDA [Pregnancy Discrimination Act]." Pet. 13 n. 7. It does. *See* Pet. App. 43a-44a (analyzing BFOQ defense "[i]n the context of the Pregnancy Discrimination Act," and emphasizing the need "to avoid either using traditional stereotypes or falling into the equally unsatisfactory alternative of ignoring the real differences between men and women").

of Appeals' alleged failure to consider a number of suggested alternatives to Johnson Controls' Fetal Protection Policy which the UAW now advances and which, it asserts, might provide satisfactory protection against the risk of fetal harm with less impact on fertile women (*e.g.*, narrowing the class of fertile women excluded from high-risk positions, experimenting with greater individual testing or employee education, etc.). Pet. 2, 5-6 & n. 2, 11-12, 23 n. 15, 24 n. 16. The UAW omits to mention that it *waived* this issue below. It explicitly advised the Court of Appeals that, while the question of "alternative policies" would "ordinarily be at issue in a case of this type," it had elected *not* to pursue that issue; instead, it had decided that the "only [issues] that will determine the outcome of *this* case" were the questions of the risks of lead to the offspring of female workers as compared "to the offspring of male workers" and "to the adult workers" themselves. Brief of Plaintiffs-Appellants 36 n. 14, 37-38 (emphasis added). The Court of Appeals accordingly held that the UAW had waived the issue of adequate but less discriminatory alternatives pursuant to Fed. R. App. P. 28(a)(4). Pet. App. 36a-38a. The UAW has not petitioned for review of the Court of Appeals' waiver decision, but instead has simply ignored it.

Third. Although the UAW suggests the Court of Appeals' decision by its terms will have sweeping effects, the court itself emphasized the narrowness and limited precedential significance of its decision given, *inter alia,* the following:

> a. Unlike many other industries in which toxic substances can be eliminated or reduced to safe levels, there is presently no engineering technology in this industry that can reduce employee lead exposure "to acceptable levels for fertile women"; "if ever a lead-free battery were developed, the problems in this case would fall by the wayside." Pet. App. 9a, 59a n. 43.
>
> b. Before the court's decision could be applied to any other industry or substance, there would "obviously" have to be the "same rigid testing and research" that had "conclusively established the grave risk from lead substances." Pet. App. 59a n. 43.

> c. The court's factual analysis of the relative risks of transmitting lead to an unborn child through the mother as opposed to the father was limited to the "scientific data available as of this date." Pet. App. 36a.[20]
>
> d. The critical question of "adequate but less discriminatory alternatives" was not before the court as a result of the UAW's waiver of that issue. Pet. App. 36a-38a.

REASONS FOR DENYING THE WRIT

The UAW's petition for certiorari should be denied for at least five reasons:

First. The United States courts of appeals that have thus far considered the issue have *unanimously* and correctly held that Title VII permits an employer to adopt a fetal protection policy where (a) there is a substantial risk of harm to employees' offspring through workplace exposure to toxic hazards, (b) the transmission of that harm to offspring is confined to employees of one sex, and (c) there are no adequate but less discriminatory alternatives to the employer's policy. This unanimous precedent does not conflict, but is entirely consistent, with applicable decisions of this Court.

Second. Although the courts have in other respects taken different analytical approaches and allocated proof burdens in different ways, these issues—which are at the heart of the UAW's petition—are of only theoretical significance in *this* case because the Court of Appeals found that Johnson Controls was entitled to judgment under *either* a BFOQ *or* a business necessity defense and *irrespective* of where the relevant burdens of persuasion were placed. Thus the petition in effect seeks an advisory opinion on

[20]The UAW attempts to ascribe broader significance to this case by asserting that the Court of Appeals "held, as a matter of law," that "animal studies can *never* constitute substantial evidence of risk to humans." Pet. 15, 26 (emphasis in original). As shown below, pp. 22-24 *infra,* the Court of Appeals did no such thing, determining instead that the *particular* animal studies evidence the UAW had submitted to the District Court was "speculative and unconvincing" on the question whether lead-induced injuries can be transmitted to a fetus through the father at the blood lead levels involved here, and thus was insufficient to withstand summary judgment. Pet. App. 34a.

these issues. Their consideration by this Court should await a case in which their resolution would have a concrete effect upon the outcome.

Third. This would be a particularly inappropriate case for considering the permissible scope of fetal protection policies given that the UAW *expressly* waived the issue of "adequate but less discriminatory alternatives" below, and since that issue is thus not properly before this Court.

Fourth. With the exception of its "burden of persuasion" and "animal studies" arguments—both of which plainly mischaracterize the decision below—the UAW has not petitioned for review of whether the standards of Fed. R. Civ. P. 56 were properly applied to the record evidence in this case. That outcome-determinative question is thus not before this Court. In any event, the medical and scientific issues that the UAW did not waive below are intensely fact-bound, have been painstakingly considered by both the District Court and the Court of Appeals, and do not warrant this Court's plenary review.

Finally. Given the fact-specific nature of the inquiry and the UAW's waivers and concessions below, the Court of Appeals' decision is of limited precedential significance—as that court itself emphasized.

We address these considerations in turn.

I. Unanimous Federal Precedent Holds That Title VII Permits An Employer In Narrow Circumstances To Adopt A Fetal Protection Policy.

The UAW contends that a fetal protection policy of the sort involved in this case is *per se* illegal under Title VII. Such a program, it asserts, represents an impermissible "paternalistic concern" in matters that are none of an employer's business; the employer must defer to "a woman's own assessment of the risks of lead exposure." Pet. 22-23.

This view has *unanimously* been rejected by the courts of appeals that have addressed the issue. *See International Union,*

UAW v. Johnson Controls, Inc., 886 F.2d 871 (CA7 1989) (en banc); *Hayes v. Shelby Memorial Hospital,* 726 F.2d 1543 (CA11 1984); *Wright v. Olin Corp.,* 697 F.2d 1172 (CA4 1982). It also has been rejected by the Equal Employment Opportunities Commission (EEOC), the federal agency charged with enforcement of Title VII. *See* EEOC, *Policy Guidance on Reproductive and Fetal Hazards* (Oct. 3, 1988) (hereinafter *1988 EEOC Policy Guidance*), *reprinted in* Fair Employment Practices Manual (BNA) 401:6013; EEOC, *Policy Guidance on United Auto Workers v. Johnson Controls, Inc.* (Jan. 24, 1990) (hereinafter *1990 EEOC Policy Guidance*), *reprinted in* Pet. App. 127a-144a.

Specifically, while emphasizing that fetal protection policies are permissible only in extremely narrow circumstances and may not be based in any way upon notions of romantic paternalism or stereotyped characterizations of the sexes, the courts *unanimously* have recognized that Title VII allows sex-based distinctions where necessary to industrial safety—"the health of workers and their families, consumers, and environmental neighbors." *Wright,* 697 F.2d, at 1190 n. 26; *see also Hayes,* 726 F.2d, at 1552 n. 14. As the Court of Appeals emphasized below,

> "industrial safety (preventing hazards to health) is legitimately part of the 'essence' of the 'business' of a battery manufacturer, as it is of any manufacturing enterprise . . . . Certainly a policy is directly related to industrial safety when it protects unborn children from a substantial risk of devastating and permanent impairment or loss of intellectual ability or injury to vital organs resulting from exposure to a toxic industrial chemical." Pet. App. 48a-49a.[21]

Not only are the courts in full agreement on this point, they all have considered the same underlying factors in assessing the va-

[21]Even two of the dissenting judges below, while disagreeing with the majority on other grounds, agreed that properly tailored fetal protection policies are permissible under Title VII. "[N]othing in the text of [Title VII], or in its history or purpose," suggests that "the normal (civilized, humane, prudent, ethical) operation of [a] particular business" may not include concern for the safety and health of the unborn children of its employees. Pet. App. 69a (Posner, J.); *see also* Pet. App. 60a (Cudahy, J.).

lidity of particular fetal protection policies. While taking different positions on whether these factors should be described as a business necessity or BFOQ analysis, *all* courts have concluded that a challenged policy is proper where

> (a) there is a substantial risk of harm to employees' offspring through workplace exposure to toxic hazards;
>
> (b) the transmission of that harm to offspring is confined to employees of one sex; and
>
> (c) there are no adequate but less discriminatory alternatives to the employer's policy.

See Pet. App. 20a-28a; *Wright,* 697 F.2d, at 1190-1192; *Hayes,* 726 F.2d, at 1548, 1552-1553; *see also EEOC 1990 Policy Guidance,* Pet. App. 138a-139a ("pertinent questions" are the same "whether one applies the BFOQ or 'business necessity' analysis").[22] The courts also have agreed that an employer cannot simply rely on subjective good faith beliefs; it must produce independent medical and scientific evidence "supported by the opinion evidence of qualified experts in the relevant scientific fields." *Wright*, 697 F.2d, at 1190; *see also* Pet. App. 53a; *Hayes*, 726 F.2d, at 1548.[23]

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[22]Implicit in the third factor is the requirement that the policy actually and effectively reduce the health risks to unborn children. "In other words, to avoid Title VII liability for a fetal protection policy, an employer must adopt the most effective policy available, with the least discriminatory impact possible." *Hayes,* 726 F.2d, at 1553.

[23]The courts also are in agreement that proof to a certainty on these matters is not required, but instead proof that " 'within the qualified scientific community . . . there is so considerable a body of opinion that significant risk exists . . . that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one.' " Pet. App. 32a (*quoting Wright*, 697 F.2d, at 1191); *see also Hayes,* 726 F.2d, at 1548-1549. This uniform view accords with this Court's approach to safety issues in employment discrimination cases. *See, e.g., Western Air Lines, Inc. v. Criswell,* 472 U.S. 400, 419-420 (1985) (*re* BFOQ defense under ADEA) ("The uncertainty implicit in the concept of managing safety risks always makes it 'reasonably necessary' to err on the side of caution in a close case. The employer cannot be expected to establish the risk of [injury] 'to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound' ") (citation omitted).

This consensus among the lower courts is consistent with this Court's applicable decisions, which have emphasized that Title VII permits employment classifications grounded on *"actual physical"* differences between the sexes, as opposed to "archaic or stereotypical notions." *California Federal Savings & Loan Ass'n v. Guerra,* 479 U.S. 272, 290 (1987) (emphasis in original); *see also Dothard v. Rawlinson,* 433 U.S. 321, 334-337 (1977). *Cf. Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 481 (1981) (Blackmun, J., concurring) (equal protection standards do not require one "to pretend that demonstrable differences between men and women do not really exist"). Moreover, the Court has stressed that Title VII reflects a "*balance* of rights" and does not require an employer to abandon legitimate business concerns. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1788 (1989) (emphasis added); *see also id.*, at 1786. One such concern, repeatedly approved by this Court, is the taking of reasonably necessary measures "to further the overriding interest in public safety." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985) (*re* BFOQ defense under ADEA); *see also New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 n. 31 (1979) (business necessity defense); *Dothard*, 433 U.S., at 335-337 (BFOQ defense).

The UAW's argument that safety should be viewed as being part of the "essence" and "central mission" of only a narrow class of businesses, and of concern only with respect to some classes of potential victims, finds no warrant in Title VII analysis. Pet. 22-24. Industrial safety should be a matter of "overriding interest," *Western Air Lines, supra,* at 413, to all manufacturers; as the Court of Appeals noted below, "Johnson Controls has properly made it part of its business to attempt to manufacture batteries in as safe a manner as possible" so as to minimize a "substantial risk of devastating and permanent" injuries to unborn children. Pet. App. 48a-49a.[24]

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[24]The UAW's argument is particularly disquieting in light of the limited legislative history of what Congress had in mind by a BFOQ. Among the examples of a BFOQ given were "the preference of a French restaurant for a French

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The UAW's suggestion that this Court has held that Title VII allows " 'the individual woman to make [the] choice for herself . . . [whether] to weigh and accept [the] risks' " is similarly misplaced. Pet. 22 *(quoting Dothard*, 433 U.S., at 335). The Court in *Dothard* emphasized instead that while this is so "[i]n the usual case," it is not when the safety of others "is at stake." 433 U.S., at 335 (permissible to exclude women guards from "male, maximum-security, unclassified penitentiary" where their presence would pose "a real threat" to themselves, other security personnel, and inmates). Similarly, "[m]ore is at stake," *ibid.*, in a case like this where the objective evidence establishes that maternal exposure to lead at the levels involved here threatens "devastating and permanent" injuries to unborn children, even where that exposure has occurred well before conception, Pet. App. 49a.

On the underlying legality of narrowly drawn and medically validated fetal protection policies, there is thus no conflict among the lower courts or with this Court's applicable decisions.

II. Differences Among The Courts Respecting The Appropriate Analytical Framework And The Allocation Of Proof Burdens Were Immaterial To The Outcome Below.

Although the courts have unanimously held that Title VII permits employers to adopt fetal protection policies in narrow circumstances, the UAW is correct that they have pursued different analytical approaches in reaching this result. *Wright* viewed such policies solely under a disparate impact/business necessity analysis. 697 F.2d, at 1186-1192. *Hayes* viewed such policies as "presumptively" constituting disparate treatment, but held the presumption could be rebutted upon a demonstration of (1) "substantial risk" of fetal harm which is (2) confined to transmission

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cook," "the preference of a professional baseball team for male players," and the preference for hiring female nurses to care for female patients. *See* 110 Cong. Rec. 2718 (1964) (remarks of Rep. Goodell); *id.*, at 7213 (memorandum of Sens. Clark and Case). It is difficult to fathom why these concerns should be lawful under Title VII but a concern for protecting the health of unborn children should not.

through one sex; if the presumption were rebutted, disparate impact/business necessity analysis would then apply. 726 F.2d, at 1548-1553.[25] The EEOC substantially embraced the business necessity approach in 1988 while noting that a BFOQ analysis was also potentially applicable.[26]

The Court of Appeals below agreed that a fetal protection policy could appropriately be analyzed under the business necessity defense. Although *Wright* and *Hayes* had allocated the burden of persuasion to the employer on the issues of substantial fetal risk and whether transmission of that risk was confined to the mother, the court below noted that, pursuant to this Court's decision last Term in *Ward's Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), while Johnson Controls bore the burden of coming forward with scientific proof on these issues, the ultimate burden of persuasion under a business necessity analysis remained with the UAW. Pet. App. 28a-30a.

The Court of Appeals went on to hold in the alternative that Johnson Controls' policy was also entirely lawful pursuant to a BFOQ defense, which *Wright* and *Hayes* had declined to follow. The court clearly recognized that Johnson Controls bore the burden of persuasion under a BFOQ analysis on all issues, and held that Johnson had carried that burden. Pet. App. 42a, 48a-54a, 58a-59a.[27]

[25]Although the use of disparate impact analysis "might be subject to logical dispute," *Wright*, 697 F.2d, at 1186, it is appropriate where "the employer can show that although its policy applies only to women, the policy is neutral in the sense that it effectively and equally protects the offspring of all employees," *Hayes*, 726 F.2d, at 1548.

[26]*See EEOC 1988 Policy Guidance*, Fair Employment Practices Manual (BNA) 401:6013. The EEOC subsequently has disapproved the business necessity analysis in light of *Ward's Cove* and the decision below, concluding that "BFOQ is the better approach." *EEOC 1990 Policy Guidance*, Pet. App.134a.

[27]As the Court of Appeals explained, a BFOQ analysis of a fetal protection policy involves "similar" scrutiny of the same underlying factors considered under the *Wright/Hayes* business necessity analysis. Pet. App. 43a. For this reason, the UAW is wrong in contending that the Court of Appeals should not have resolved the BFOQ question because "the District Court had declined to

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The UAW asserts these analytical differences are "of sufficient importance to be outcome determinative in this case"; it would have this Court believe that "[t]he Court of Appeals expressly recognized that placing the burden of proof on the plaintiffs . . . was essential to its ultimate affirmance of summary judgment." Pet. 11, 14; *see also id.*, at 21 (court "stressed" that allocation of proof burden was "its reason for approving a grant of summary judgment").

The Court of Appeals obviously did no such thing; to the contrary, it took pains to emphasize that under either a BFOQ or a business necessity analysis, and regardless of which party bore the ultimate burden of persuasion, Johnson Controls was entitled to summary judgment given the overwhelming evidence it had marshalled and the UAW's concessions and waivers of key issues (as discussed in greater detail below). Unless this Court were to conclude that fetal protection policies are *never* permissible under Title VII—a proposition that every court and the EEOC have rejected—its consideration of the questions presented by the UAW would be an abstract exercise wholly immaterial to the outcome below.

The UAW is correct that these questions are of "theoretical" significance. Pet. 14. Given the Court of Appeals' alternative holdings, they are nothing more than that in *this* case. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories,* 351 U.S. 292, 297 (1956); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The Court does not sit to decide " 'abstract propositions' " through advisory opinions. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (*per curiam*) (citation omitted); *see also Rice*

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reach the issue." Pet. 12. The District Court had considered all of the underlying issues relevant to the BFOQ defense and, since its decision predated *Ward's Cove*, had allocated *to Johnson Controls* the burden of persuasion on the issues of fetal harm and relative risks of transmission. Pet. App. 114a-118a. The other relevant issue—whether there were adequate but less discriminatory ways in which Johnson Controls' policy might have been crafted—was waived by the UAW on appeal. *See* Part III *infra.*

v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955). Moreover, this is the first fetal protection case since the decision in *Ward's Cove* last June. There surely will be more such cases, and if uncertainties should persist among the lower courts there will be time enough for this Court to address them. Resolution of whether a BFOQ or business necessity analysis applies, and of how to allocate the persuasion burdens, "can await a day when the issue[s are] posed less abstractly" and when their disposition would have a "meaningful" result on the outcome in the case at hand. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari as improvidently granted).

III. This Case Does Not Properly Present The Question Of The Permissible Scope Of A Fetal Protection Policy Because The UAW Waived That Issue Below.

The question whether there are feasible alternatives to a challenged fetal protection policy obviously is of central importance under both a BFOQ ("reasonably necessary") and business necessity ("adequate but less discriminatory alternatives") analysis. *See Western Air Lines, Inc. v. Criswell*, 472 U.S., at 413-415 (BFOQ); *Wards Cove*, 109 S. Ct., at 2125-2127 (business necessity). In its petition to this Court, the UAW repeatedly suggests that there might be feasible alternatives to the policy at issue here—perhaps the class of affected employees could be narrowed, or the number of restricted positions be reduced, or the blood-lead and air-lead triggers be refined, or renewed attempts at employee education and individual testing be tried. Pet. 2, 5-6 & n. 2, 11-12, 24 n. 16, 29.

These matters are not properly before this Court, however, because the UAW waived the issue of alternative approaches before the Court of Appeals. Specifically, the UAW emphasized to that court that it was presenting "two factual issues" on appeal—the comparative risks of lead transmission to the fetus through the male and the female, and the relative risks of lead to fetuses and adults. Brief of Plaintiffs-Appellants 32-34, 37-38. These is-

sues were "the *only* ones that will determine the outcome of *this* case." *Id.*, at 37 (emphasis added). The UAW went on to advise the court that it had decided not to contest the District Court's summary judgment with respect to "[t]he other material fact that would ordinarily be at issue in a case of this type"— "the question of whether there were alternative policies which the defendant could have adopted, other than the Fetal Protection Policy, which would have had a less disproportionate affect [*sic*] on the women workers." *Id.*, at 36-37 n. 14.[28] Johnson Controls noted in its brief in opposition (p. 33) that "the UAW does not even contest this point"; the UAW's reply brief was silent on the issue.

The Court of Appeals accordingly (and properly) held that the UAW had waived the issue of adequate but less discriminatory alternatives pursuant to Fed. R. App. P. 28(a)(4), which requires an appellant's brief to contain "the contentions . . . with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." *See* Pet. App. 36a-38a. The UAW has not sought review of this waiver determination; indeed, it does not even mention it.

Because the UAW waived the issue of whether and to what extent there might be reasonable alternatives to Johnson Controls' policy, that issue should not now be considered by this Court. *See, e.g., EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (this Court's "normal practice" is "to refrain from addressing issues not raised in the Court of Appeals") (dismissing writ of certiorari as improvidently granted); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n. 7 (1982) ("[b]ecause petitioner did not present this argument to the Court of Appeals, we do not address it"); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). This should particularly be so where, as here, the Court of Appeals found the issue was waived and the petitioner has not sought review of that determination. It is difficult to perceive how a challenge to an employer's fetal protection policy

[28]The UAW also explained to the Court of Appeals that "the plaintiffs did not respond" to Johnson Controls' evidence that less restrictive alternatives had been tried but found insufficient. Brief of Plaintiffs-Appellants 36-37 n. 14.

might be certworthy where the question of alternatives to that policy is not properly before the Court. In circumstances such as this, where a "central" issue on which the proper resolution of the case "may well turn cannot be reached or resolved" because of the petitioner's waiver below, it would be improvident to grant certiorari. *EEOC v. Federal Labor Relations Authority, supra,* at 24.

IV. The UAW Restricts Its Challenge To The Propriety Of Summary Judgment To Two Arguments, Both Of Which Are Plainly Wrong.

The focus of the UAW's argument to the Court of Appeals was that the District Court had erred in granting summary judgment pursuant to Fed. R. Civ. P. 56(c) because there were allegedly significant disputes over several medical issues. Brief of Plaintiffs-Appellants 36-39.[29] Among other contentions, the UAW made the curious argument that the normal tools of civil discovery had not given it "any adequate opportunity" to counter Johnson Controls' expert evidence since "it is not usually considered good tactics to expose your case prematurely at the deposition stage, by prereviewing [*sic*] the types of questions the other side's experts will be asked" if the case is permitted to go to trial. *Id.*, at 38. The Court of Appeals rejected the UAW's Rule 56 arguments, holding that, under either a BFOQ or a business necessity analysis, summary judgment had properly been granted on the record before the District Court. Pet. App. 59a.

Whether the Court of Appeals properly applied this Court's Rule 56 precedents to the particular record evidence in this case is hardly a certworthy question, *and the UAW's petition nowhere presents this as a question for review.*[30] Instead, the UAW confines its summary judgment challenge to two discrete issues, the reso-

[29]The UAW also argued that sex-specific fetal protection policies are *per se* illegal under Title VII. Brief of Plaintiffs-Appellants 39-44. As to this contention, *see* Part I *supra.*

[30]The petition does not even cite to Rule 56 or to any of this Court's decisions construing the standards for granting or reviewing summary judgments.

lution of which it contends was "essential to [the] ultimate affirmance of summary judgment." Pet. 11. Both arguments are spurious.

First. The UAW contends that the Court of Appeals' allocation of the burden of persuasion to the plaintiff under a business necessity analysis (pursuant to *Ward's Cove*) was "certainly" necessary to sustain summary judgment, as the Court of Appeals itself "expressly recognized" and "stressed." Pet. 11, 21. As already shown, the Court of Appeals did no such thing; it emphasized instead that summary judgment was equally proper if all proof burdens were allocated to Johnson Controls under a BFOQ analysis. Pet. App. 42a, 48a-54a, 58a-59a.

Second. The UAW would have this Court believe that the Court of Appeals "held, as a matter of law," that "animal studies can *never* constitute substantial evidence of risk to humans"—a "holding" that was "vital" to the affirmance of summary judgment. Pet. 15, 26 (emphasis in original); *see also id.*, at 11-12. The UAW goes so far as to present this as a separate question for review, warning that "[t]his sweeping holding" and "categorical disqualification of animal studies" not only conflicts with other precedents but will undermine "the nation's health and safety regulatory system." Pet. 26-27.

While the UAW assures that "[t]he implications . . . cannot be overstated," Pet. 27, it has managed to do *precisely* that by omitting several key words from its misquotation of the language in the Court of Appeals' opinion. According to the UAW, the court below

> "ruled that 'animal research does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead.' " Pet. 12.

What the court *actually* said—the words omitted from the petition are italicized—was this:

> "*The UAW's* animal research *evidence* does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion . . . ," etc. Pet. App. 34a.

Properly quoted, and placed in the context of the surrounding analysis, the Court of Appeals' discussion does not even remotely suggest a "categorical disqualification of animal studies," but instead an analysis of the *particular* animal studies tendered and a rejection of any extrapolation to humans from those *particular* studies as "speculative and unconvincing." Pet. App. 34a. *Of course* animal studies can constitute an important predictive tool in appropriate cases, but "[t]he validity of extrapolation to humans from data derived from tests on animals" depends upon the particular facts and requires the application of judgment and "expertise." *Environmental Defense Fund, Inc. v. EPA,* 510 F.2d 1292, 1299 (CADC 1975). Here there was substantial expert evidence that "[s]tudies of the effect on the offspring of lead exposed male rats cannot be readily extrapolated to the human male, particularly as to the dose necessary to cause reproductive effects."[31] The Court of Appeals accepted this expert evidence and emphasized the significant "differences between the effect of lead on the human and animal reproductive systems." Pet. App. 34a (citing to affidavits and deposition testimony).

UAW experts themselves agreed with this conclusion:

> "I think there is very strong evidence based on both animal and human information that above a blood lead of perhaps 60 to 70 that there can be an impact on the male reproductive tract.

[31]Hammond Aff. ¶ 7; *see also* Scialli Aff. ¶ 9 (rodent studies in this area "cannot be extrapolated to humans" because "[t]he reproductive system of the rodent, in terms of transmissible changes in offspring due to exposure to toxic substances, is simply not analogous to the human reproductive system, male or female"); Chisolm Dep. 49-50. Dr. Scialli offered as "[a] specific example . . . the drug Thalidomide which was used in the 1960's to treat pregnant women. This drug was given to mice and rats and did not cause any birth defects; however, the drug caused major limb defects in human offspring." Scialli Aff. ¶ 9.

"Based on animal studies alone, it would appear that there is an impact of lead on the male reproductive tract lower than that, as low as perhaps say 40 to 50 blood lead.

"And it has [been] shown to cause problems in certain species of animals *but I cannot say that that's really the case in humans because we do not have good data in male patients, male subjects at those kinds of levels.*

"So I'm hesitant to make a statement one way or the other. *We don't know.*" Brix Dep. 19-20 (emphasis added).

Another UAW expert conceded the same point:

"Q. Am I correct in understanding that the literature does know with better certainty the levels at which the small child, and by extrapolation, the fetus, is in danger?

"A. Right.

"Q. Well below the current OSHA standard?

"A. Exactly.

"Q. And, certainly, you would agree that the knowledge of those safe or unsafe levels, if I can use that terminology, are well-documented and known with respect to the fetus and the small child; whereas, *when we are dealing with the spermatogenesis type problem, we are still dealing, based on current literature, in an unknown in terms of the precise levels?*

"A. *I would agree with that statement. I would certainly agree with that statement.*" Legator Dep. 63 (emphasis added).

Thus the UAW is flatly wrong in asserting that the Court of Appeals rejected the validity of animal studies "as a matter of law." Pet. 26. Rather than challenge the court's application of the standards of Rule 56 to the particular animal studies data in the record—which is not a certworthy issue—the UAW has simply tried to mischaracterize what the court did.

Putting the burden-of-persuasion and animal studies questions to one side, the UAW has not petitioned this Court to review the lower courts' application of well-settled summary judgment law

to the record evidence that was before the District Court. The lower courts' conclusions on the issues of lead's harm to fetuses and the transmission of that harm through women but not men at the blood lead levels involved here are, given the UAW's waiver of the less discriminatory alternatives issue, outcome-determinative under either a BFOQ or a business necessity analysis. And in any event, these complex questions are extremely fact-bound, have already been closely scrutinized by two federal courts,[32] and do not warrant this Court's plenary review.

V. Certiorari Should Be Denied Given The Unique Factual And Procedural Posture Of This Case.

Finally, the suggestion that the Court of Appeals' decision somehow might foreclose 20 million industrial jobs to women, and thereby constitutes "the most important" Title VII case *ever* decided by *any* court, is hyperbole. Pet. 14, 27-28 (quoting Judge Easterbrook's dissent below). The Court of Appeals emphasized there is no room in the law for stereotyped characterizations of the sexes; fetal protection programs must rest on "convincing scientific evidence" rather than myths and assumptions. Pet. App. 53a. The court's decision by its terms "obviously" can be applied in other circumstances only if the "same rigid testing and research" can "conclusively establish[ ] the grave risk" demonstrated here. Pet. App. 59a n. 43. Even with respect to the dangers of this *one* substance in this *one* company, the decision is based upon the "scientific data available as of this date" and the conceded inability of this employer to reduce lead exposure to levels that would eliminate substantial risks to fetal life. Pet. App. 9a, 36a, 59a n. 43.

Moreover, although the analytical issues discussed above might well be significant in the future fetal protection cases that surely will come before this Court, the unusual posture of *this* case renders it an inappropriate candidate for consideration of those issues:

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[32] *Cf. NCAA v. Board of Regents*, 468 U.S. 85, 98 n. 15 (1984); *Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980).

a. Although the UAW complains about the status of the summary judgment record, any shortcomings in that record result from the UAW's own concession below that substantial fetal risk "is not one of the disputed issues," its decision that it would "not respond" to Johnson Controls' evidence that there were no adequate but less discriminatory alternatives, and its strategic choice not to take more discovery because it would not be "good tactics to expose your case prematurely at the deposition stage" in preparing to resist a summary judgment motion. (The quotes all are from the UAW's brief to the Court of Appeals, pp. 36-38 & n. 14.) Most Title VII litigants can be expected to preserve issues they care to pursue and to develop a record they consider appropriate; courts should not encourage otherwise.[33]

b. The UAW waived the adequate but less discriminatory alternatives issue before the Seventh Circuit. *See* Part III *supra*. This Court should not consider the permissible scope of a fetal protection policy in a case where the issue of feasible alternatives to that policy has been waived.

c. The Court of Appeals' alternative holdings render the analytical differences among courts abstract and immaterial to the resolution of *this* case; the petition in this respect is nothing more than a request for an advisory opinion.

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[33]Perhaps it was the UAW's remarks quoted in text that prompted the Court of Appeals to make this observation: " 'A district court need not scour the record to make the case of a party who does nothing. . . . [C]ourts will not discover that the movants slighted contrary information if opposing lawyers sit on their haunches; judges may let the adversary system take its course.' " Pet. App. 31a (*quoting Herman v. City of Chicago*, 870 F.2d 400, 404 (CA7 1989)). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole").

CONCLUSION

For all of the foregoing reasons, the respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Dated this 1st day of March, 1990.

Respectfully submitted,

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